

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

11 JESUS E. ESPINOZA,) 3:06-cv-00542-HDM-VPC
12 Plaintiff,)
13 vs.) ORDER
14 E.K. McDANIEL, et al.,)
15 Defendants.)
16 _____)

17 Before the court is the Report and Recommendation of the
18 United States Magistrate Judge ("R&R") (#23) in which she
19 recommends that the defendants' Motion to Dismiss (#14) be granted.
20 No objections to the R&R have been filed. The court conducts a de
21 novo review of the report and recommendations. 28 USCS §
22 636(b) (1) (C) .

23 Plaintiff Jesus Espinoza ("Espinoza") brings a claim under 42
24 U.S.C. § 1983 for violation of his Eighth Amendment right to be
25 free from cruel and unusual punishment as well as state law tort
26 claims. Espinoza claims that defendant C/O Saunders (erroneously
27 named as Sanders) slammed the foodslot door three times on
28 plaintiff's hand without justification. Espinoza also claims that

1 defendant S. C/O Gledhill (formerly known as Doty) knew that
2 Saunders was going to perform such an action and failed to prevent
3 it. Finally, Espinoza claims that defendants Adam Endel and E.K.
4 McDaniel failed to properly investigate and discipline their
5 subordinates with regard to the incident.

6 In considering a motion to dismiss for failure to state a
7 claim under Fed.R.Civ.P. 12(b) (6), the court must accept as true
8 all material allegations in the complaint as well as all reasonable
9 inferences that may be drawn from such allegations. *LSO, Ltd. v.*
10 *Stroh*, 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the
11 complaint also must be construed in the light most favorable to the
12 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th
13 Cir. 2000). The purpose of a motion to dismiss under Rule 12(b) (6)
14 is to test the legal sufficiency of the complaint. *Navarro v.*
15 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court can grant the
16 motion only if it is certain that the plaintiff will not be
17 entitled to relief under any set of facts that could be proven
18 under the allegations of the complaint. *Cahill v. Liberty Mut.*
19 *Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996).

20 Additionally, the allegations of a pro se plaintiff's
21 complaint are held to a less stringent standard than those drafted
22 by a lawyer. *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam).

23 A government official is shielded from civil damages unless
24 their conduct violates "clearly established statutory or
25 constitutional rights which a reasonable person would have known." *Harlow v Fitzgerald*, 457 U.S. 800, 818 (1982). Prison officials
26 violate the Eighth Amendment when they engage in the "wanton and
27 unnecessary infliction of pain." *Wilson v Seiter*, 501 U.S. 294
28

1 (1991).

2 "A supervisor may be liable under § 1983 only if there exists
3 either (1) his or her personal involvement in the constitutional
4 deprivation, or (2) a sufficient causal connection between the
5 supervisor's wrongful conduct and the constitutional violation."
6 *Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001) (internal
7 citations and quotations omitted).

8 In this case, Espinoza alleges that C/O Saunders intentionally
9 slammed the foodslot door on his fingers three times without
10 provocation. C/O Saunders claims that he was closing the foodslot
11 door when Espinoza thrust his hand through in order to keep the
12 door open. Accepting Espinoza's version of events, as the court
13 must at this stage of the proceedings, Espinoza has stated a claim
14 under § 1983 against C/O Saunders.

15 Espinoza's claims against McDaniel and Endel for failure to
16 discipline their subordinates do not state a claim under § 1983.
17 Plaintiff does not allege that either McDaniel or Endel was
18 personally involved in slamming his fingers in the foodslot or that
19 there is a causal connection between the alleged constitutional
20 violation and the supervisor's conduct. Likewise, Espinoza's claim
21 against S. C/O Gledhill for failing to prevent Saunders' alleged
22 conduct fails to state a claim under § 1983.

23 To the extent that the R&R converted the Motion to Dismiss to
24 a Motion for Summary Judgment, Espinoza's failure to file points
25 and authorities in opposition is not fatal under Local Rule 7-2.
26 "A motion for summary judgment cannot be granted simply because
27 there is no opposition, even if the failure to oppose violated a
28 local rule." *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950

1 (9th Cir. 1993) (quoting *Hibernia Nat'l Bank v. Administracion*
2 *Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985)).

3 Although not addressed by the magistrate judge, the Motion to
4 Dismiss also seeks dismissal of the state claims. Espinoza alleges
5 violations of Nevada's criminal statute for assault and battery.
6 The court will liberally construe these as a tort claim for assault
7 and battery.

8 Espinoza has failed to allege that McDaniel, Endel, or S. C/O
9 Gledhill had any involvement in slamming the foodslot door on his
10 hand. Therefore, no claim for assault or battery can be maintained
11 against these defendants. Espinoza has properly alleged an assault
12 and battery claim with respect to C/O Saunders in his individual
13 capacity.

14 Accordingly, the court **ADOPTS IN PART** the report and
15 recommendation of the United States Magistrate Judge (#23). The
16 Motion to Dismiss (#14) with respect to defendants E.K. McDaniel,
17 Adam Endel, and S. C/O Gledhill is **GRANTED** as to all claims. They
18 are **DISMISSED WITH PREJUDICE**. The Motion to Dismiss (#14) with
19 respect to defendant C/O Saunders is **DENIED WITHOUT PREJUDICE** to
20 renew on a motion for summary judgment upon completion of
21 discovery.

22 It is so **ORDERED**.

23 DATED: This 6th day of August, 2007.

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UNITED STATES DISTRICT JUDGE
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